

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

WEDNESDAY, THE 28TH MARCH 2007 / 7TH CHAITHRA 1929

WP(C).No. 2913 of 2007(V)

PETITIONER:

**PETER P.A., AGED 31 YEARS,
S/O.P.P.AUGUSTINE, PARAMBALOTH HOUSE,
MANIKKATH ROAD, RAVIPURAM, KOCHI- 682 016.**

**BY ADV. SRI.C.S.MANU
SRI.S.K.PREMRAJ
SRI.ANOOP JOSEPH
SRI.ANOOP.V.NAIR
SRI.ABHILASH AKBAR**

RESPONDENTS:

- 1. STATE OF KERALA, REPRESENTED BY THE
SECRETARY TO GOVERNMENT OF KERALA,
DEPARTMENT OF TAXES, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.**
- 2. DIRECTOR OF STATE LOTTERIES,
KERALA STATE LOTTERY DEPARTMENT,
TRIVANDRUM.**

BY GOVERNMENT PLEADER SRI.V.V.ASOKAN

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 12/03/2007, ALONG WITH WPC NO. 6770 OF 2007 AND CONNECTED CASES
THE COURT ON 28.03.2007 DELIVERED THE FOLLOWING:**

W.P.(C) NO.2913/2007

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE LOTTERY TICKET PURCHASED BY THE PETITIONER.

EXT.P2:- COPY OF THE NEWS PUBLISHED IN MALAYALA MANORAMA DAILY DT.23.1.07.

RESPONDENTS EXHIBITS

EXT.R1(a):- COPY OF THE ORDER G.O.(MS) NO.117/06/TD DT.28.10.06.

EXT.E1(b):- COPY OF THE G.O.(P) NO.50/07/TD DT.22.1.07.

/TRUE COPY/

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THOTTATHIL B. RADHAKRISHNAN, J.

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WP(C).Nos.2913/2007-V, 4744/2007-M,

5890/2007-A & 6770/2007-E

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Dated this the 28th day of March, 2007.

JUDGMENT

Petitioners purchased tickets of Sports Super Bumper Lottery - 1285th Kerala State Lottery - conducted by the Government of Kerala. The tickets priced Rs.100/- each, were issued announcing a first prize of Rs.2 crores, 200 second prizes of Rs.2 lakhs each, 2000 third prizes of Rs.25,000/- each, as well as different numbers of fourth, fifth, sixth, seventh and eighth prizes, apart from 19 consolation prizes of Rs.1 lakh each.

2. These writ petitions are filed complaining that the original schedule for the draw was illegally adjourned and that the Government have, without authority, reduced the number of prizes, after the sale of the tickets.

3. As per the counter affidavit, the total prize money of the lottery tickets, going by what is stated on the face of the tickets, would be around Rs.40,19,00,000/-. The Government aimed to sell at least two crores of tickets, intending to disburse the total prize money, as fixed, and to raise a further amount for being invested in various developmental activities of sports in the State of Kerala. However, the lottery did not evoke the expected response. Accordingly, the Government postponed the declared date of draw, anticipating that more tickets could be sold. Thereafter, the lot was drawn on 10-2-2007. Out of a total number of forty lakhs tickets printed, only 29,44,798 were sold leaving 10,55,202 as unsold. Therefore, the entire amount generated by the sale of tickets is Rs.29,44,79,800/-. In view of that fact, acting on Clause 4 of Annexure III of Ext.R1(a) G.O.(Ms.)No.117/06 dated 28-10-2006, the first prize was drawn in full, coming under the assured portion of prizes and the remaining prizes were drawn under the variable portion, depending on the number of tickets sold.

4. The learned counsel for the petitioners argued, primarily, that the Government have acted contrary to Rule 9(1) of the Kerala Paper Lotteries (Regulation) Rules, 2005, hereinafter referred to as the "Rules", for short, whereby the Government guarantee the payment of the prizes and prize amount offered on the lotteries and that, by the force of that rule and on counts of estoppel, the Government cannot go back on either the prize amount or the total number of prizes offered at the time when the tickets were sold. The second contention raised is that the Government acted illegally and mala fide in adjourning the date of drawing the lot.

5. I shall first deal with the second among the contentions. Rule 8(6) of the Rules enables the Director of Lotteries to postpone the date of draw on valid grounds, subject to ratification by Government. It also enjoins that the postponed date of draw shall be given wide publicity. The said rule has been made by the State Government in exercise of power under Section 12 of the Lotteries

(Regulation) Act, 1998, hereinafter, the “Lotteries Act”, for short, which empowers the State Government to frame rules to carry out the provisions of that Act and in particular, to make rule regarding the time to be fixed for claiming prize money and the period to be fixed for draws of the lotteries. Therefore, Rule 8(6), as part of the rule relating to draw and results, enables postponement of the date of draw on valid grounds. Going by the counter-affidavit, the date of draw was postponed because the Government could not reach the anticipated target in the sale of tickets. That is a valid ground. It is also a matter of record, in the counter-affidavit, that the postponed date of draw was given wide publicity. Therefore, the challenge to the postponement of the draw fails. The same is rejected.

6. Coming to the fundamental ground of challenge, the question raised is as to whether the Government acted with authority, and, were justified in reducing the number of prizes or the prize amount from what was originally announced at the commencement of the sale of the tickets.

Still further, what is the legal effect of the guarantee by the Government contained in Rule 9(1) of the Rules? In answering this issue, certain vital aspects relating to the law governing lotteries need to be considered.

7. Even before the field of lotteries came to be governed by statute law, it was the recognised legal principle, with near unanimity, that a lottery is not a contract, but only an agreement by way of wager. It is merely a bet. It is only something that is staked on an issue. A lottery is merely a lot on which bets are laid. It is an arrangement for distribution of prizes by lot, a matter of mere chance. The social history would show that lotteries, at times, tended to grow to be a vice endangering the familial situations leading to break down of the socio-financial sustenance of vulnerable slots of the citizenry, particularly those belonging to the lower economic strata.

8. More than a century and a half ago, the Supreme Court of America in **Phalen v. Commonwealth of**

Virginia, (1850) 49 U.S.163 observed:

“Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with widespread pestilence of lotteries. The former are confined to a few persons and places, but, the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and the simple.”

The aforesaid observations were quoted with approval in **Douglas v. Commonwealth Kentucky, 1897-168 U.S.488**, to uphold legislative power to protect public morals against the evils of lotteries. The said decisions were quoted with approval by the Apex Court in **State of Bombay v. R.M.D.Chamarbaugwala, AIR 1957 SC 699**, to conclude that a citizen cannot claim any fundamental right under Article 19(1)(g) of the Constitution in respect of such competitions and to hold that the prize competitions are gambling in nature.

9. The aforesaid fact situations led to the growth of law by the enactment of different legislations to control and regulate lotteries, leading ultimately to the Lotteries (Regulation) Act, 1998 that now holds the filed. That Act is a statute to regulate the lotteries and to provide for matters connected therewith and incidental thereto. The validity of the Lotteries Act fell for consideration in **B.R.Enterprises v. State of U.P. and others, (1999) 9 SCC 700.** Upholding the legislation, the Apex Court laid down that the holding of lotteries organised by the State is also gambling in nature.

10. If lotteries run by the State are gambling in nature, a sale or purchase of a ticket in such a lottery would still be an agreement by way of wager and would be governed by Section 30 of the Contract Act, the relevant portion of which reads as follows:

“30. Agreements by way of wager,
void.-Agreements by way of wager are void;
and no suit shall be brought for recovering

anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.”

The only exception to Section 30 is relating to horse-race, to the extent provided in the Exception provided at the foot of Section 30.

11. As noticed in **B.R.Enterprises** (supra), even in State sponsored lotteries, what is involved is only an element of chance, with no skill. The measures provided in the Lotteries Act are meant only to encourage faith in the participants that the lotteries are being conducted fairly with no possibility of fraud and misappropriation and to assure the hopeful recipients of high prizes that all is fair and safe. In spite of the Lotteries Act being available, the jurisprudential quality of the transactions in lottery does not change. It continues to be a form of gambling and in its very nature and essence, is *res extra commercium* and does not contain any concept of trade, commerce or business. In

the realm of contracts, it would easily slip to fall within Section 30 of the Indian Contract Act, 1872. I may also notice in this context the decision of the Division Bench of the Madhya Pradesh High Court in **Subhash Kumar Manwani v. State of M.P., AIR 2000 Madhya Pradesh 109**, rendered following the decision of the Apex Court in **B.R.Enterprises** (supra). It was held by the learned Judges that the agreement for payment of a prize on a lottery ticket, even if the lottery is conducted by the State, continues to be a wager, to which the provisions of Section 30 of the Contract Act would be applicable and therefore, a suit for recovery of the prize money would not lie. I am in complete and respectful agreement with the said ratio of that decision.

12. The right of a person who buys a lottery ticket is only a right to participate in the lottery, i.e., in a gambling, which is not forbidden by law and nothing more. The legal rights of a person participating in a lottery do not get a better flair, merely because of the enactment of the

Lotteries Act. The Lotteries Act does not give any legal right to any of the participants to be paid a particular prize or to compel the State Government to draw lot for all the prizes declared before the sale of the tickets. That statute does not contain any such provision. This is because, there can be no such legislation compelling the Government to do so on the face of the fact that lottery is only an agreement by way of wager and a mere gamble and any recognition of any legal right to enforce payment of the prize due thereunder or a legal right to regulate the prize money on the assertion that particular number of prizes have to be compulsorily drawn by lot cannot be there. Any such statutory provision would not only amount to enforcing an agreement that is void in terms of Section 30 of the Contract Act, but would also be contrary to public policy and public interest. Since it would be opposed to public policy, it would also violate Section 23 of the Contract Act. Hence, any statutory compulsion on a State Government, which runs a lottery, to pay the amount declared as a prize or to conduct a lot for all the prizes enumerated in the ticket would not have the

sanction of law and will be contrary to Rule of Law.

13. In the backdrop of what is aforesaid, the legal effect of Rule 9(1) of the Rules requires to be considered.

14. As already noticed, Rule 9(1) provides that the Government guarantee the payment of prizes and prize amount offered on the lotteries. The conditions subject to which lotteries may be organised are prescribed in Section 4 of the Lotteries Act. Section 3 provides that save as otherwise provided in section 4, no State Government shall organise, conduct or promote any lottery. Therefore, when a State Government conducts a lottery, it can be only in terms of the conditions enumerated in Section 4. While Clause (k) of Section 4 enjoins that a State Government shall also follow such other conditions as may be prescribed by the Central Government, a State Government is not authorised to prescribe any further condition or create any further term for the lottery. There is no authorisation in the Act, for the State Government to do so. More importantly,

Section 3 contains a prohibition against organising, conducting or promoting any lottery otherwise than in accordance with the conditions laid down in Section 4. So much so, a State Government has no authority to make or impose any further condition, even upon itself, in relation to organising, conducting or promoting any lottery.

15. Reading the rule making power of the State Government in terms of Section 12 of the Lotteries Act in contradistinction to the power of the Central Government to make rules under Section 11 of that Act, it can be noticed that the power of the State Government to make rules stands confined to matters relating to conducting the lottery in so far as it relates to matters directly referable to Section 4. Section 12(2) gives sufficient legislative guidance to interpret Section 12(1) to hold that the generality of Section 12(1) stands guided by the contents of sub-section (2) of Section 12. Therefore, the rule making power of the State Government under Section 12 does not, in any manner, authorise the State Government to add any further

condition to those enumerated in Section 4 of the Lotteries Act as regards organising, conducting and promoting lotteries.

16. Inclusion of any condition by the State Government cannot, at any rate, run contrary to the interest of the Exchequer since the primary intention of the Lotteries Act is to regulate lotteries, the need for which is well reflected by the social and legal history on the subject. So much so, there is no intention discernible from the Lotteries Act by which a State Government organising, conducting or promoting a lottery could create any situation impairing the Exchequer to the disadvantage of the funds of the State. Therefore, while a State Government may organise, conduct or promote a lottery, it cannot guarantee the payment of the prizes or prize amount offered on the lotteries. If it does so, it will be guaranteeing the performance of an agreement by way of wager.

17. An agreement by way of wager is not a contract,

but is void by reason of Section 30 of the Contract Act. It would not, therefore, amount to a contract and hence, would not be enforceable, going by Clauses (g) and (h) of Section 2 of the Contract Act, which read as follows:

“2. Interpretation clause.-In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

xxxxxxx xxxxxxx xxxxxxx

(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract.”

18. Hence, if Government guarantee the payment of prizes and prize amount offered on the lotteries, it will be guaranteeing a transaction which is not a contract, but only

an agreement by way of a wager. Such guarantee of a wager would immediately contradict public policy. It would not withstand the test of law because what is being guaranteed is not any liability under a contract. It can never be recognised as a part of the State's obligation or for that matter, the Government's obligation to be a party to a transaction which would not be a contract in terms of the Contract Act. Therefore, a Government cannot guarantee the performance of the payment of lottery prizes.

19. In the conspectus of law as noticed above, Rule 9 (1) of the Rules by which the Government are shown as guaranteeing the payment of prizes or prize amount offered on the lotteries is a rule that is one made not only in excess of the rule making power under the Lotteries Act, but one contrary to the Constitution and the laws and therefore, arbitrary, against public interest and against the interest of the State Exchequer and cannot be upheld on the face of Part III of the Constitution, particularly Article 14. Every individual citizen and the citizens as a collective lot have

the constitutional right including the fundamental right, to ensure that their collective wealth, the State Exchequer, is not subjected to any action as is referable to Rule 9(1) of the Rules.

20. While the writ petitioners seek to sustain their contentions on Rule 9(1) of the Rules, it is the constitutional obligation of the writ court to examine the validity of that rule because, a piece of primary or subordinate legislation, which is unconstitutional cannot be the foundation of any legal right. Examining the sustainability of Rule 9(1), for the foregoing reasons, it has to be held that Rule 9(1) of the Rules whereby the Government are shown to guarantee the payment of prizes and prize amount offered on the lotteries, is unconstitutional, void and inoperative. The said rule is unsustainable and cannot be enforced. So much so, the contentions of the petitioners on the basis of Rule 9(1) of the Rules fail.

For the aforesaid reasons, these writ petitions fail.

WP(C)2913/07 & con.cases

-: 17 :-

They are accordingly dismissed. No costs.

Sha/-

**THOTTATHIL B. RADHAKRISHNAN,
JUDGE.**